

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AUBRY MCMAHON,

Plaintiff,

vs.

WORLD VISION, INC.

Defendant.

CASE NO. 2:21-CV-00920-JLR

DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

*NOTE ON MOTION CALENDAR:
May 5, 2023*

Table of Contents

I. OVERVIEW OF POSTURE ON SUMMARY JUDGMENT.	1
A. The Undisputed Facts and Law Require Judgment for World Vision.	1
B. No Genuine Issue of Fact Exists, Only a Difference of Religious Opinion.	2
C. As No Genuine Issue of Fact Exists, Summary Judgment is Proper.....	5
II. LEGAL STANDARDS GOVERNING SUMMARY JUDGMENT <i>HERE</i>	8
A. MSJ re Disparate Treatment: <i>Opara v. Yellen</i> (9th Cir. 2023).....	8
B. MSJ re First Amendment: <i>Our Lady of Guadalupe</i> (S.Ct. 2020).....	9
III. RESPONSE TO EACH OF PLAINTIFF’S ARGUMENTS.....	9
A. Plaintiff Cannot Establish Her Claims As a Matter of Law.....	9
1. No Sex or Sexual Orientation Discrimination in this Case.....	9
a) No Sex and Sexual Orientation Discrimination Here.	9
b) The Theory of Plaintiff’s Case Is Flawed.....	12
2. No Marital-Status Discrimination in this Case.....	14
B. Plaintiff Cannot Overcome Each and Every WV Affirmative Defense.	15
1. Plaintiff Cannot Overcome Title VII’s ROE.....	17
2. Plaintiff Cannot Overcome the Ministerial Exception (“ME”).	20
3. Plaintiff Cannot Overcome the Statutory BFOQ Defense.	26
4. Plaintiff Cannot Overcome WV’s Other Constitutional Defenses.	26
a) Both of Plaintiff’s Claims Are Barred by Religious Autonomy.	28
b) Both of Plaintiff’s Claims Fail Free-Exercise Scrutiny.	30
c) Both Claims Fail Expressive-Association Scrutiny.....	31
5. Plaintiff Cannot Overcome the WLAD ROE.	31
6. Defendant’s RFRA Defense Is Not At Issue on Summary Judgment.	32
IV. CONCLUSION.....	32

1 “We believe [our] efforts are a witness to Jesus Christ through life, word,
2 sign, and deed, and encourage individuals to respond to the gospel.”
3 WORLD VISION FAITH IN ACTION STUDY BIBLE, ix (Zondervan 2005).¹

4 Defendant World Vision, Inc. (“World Vision” or “WV”) herein responds to
5 Plaintiff’s Motion for Summary Judgment (Dkt. 24; “Pls. MSJ”), with references, as
6 appropriate, to World Vision’s own Motion (Dkt. 26; “Defs. MSJ”).²

7 **I. OVERVIEW OF POSTURE ON SUMMARY JUDGMENT.**

8 **A. The Undisputed Facts and Law Require Judgment for World Vision.**

9 In this atypical Title VII case, which involves no invidious discrimination, a
10 deeply religious employer is exercising its religious freedom in staffing. All material
11 facts are agreed. This is unsurprising as many material factual issues were decided by
12 this Court and the Ninth Circuit in *Spencer v. World Vision, Inc.*, 570 F.Supp.2d 1279
13 (W.D.Wash. 2008), *aff’d as amended on denial of reh’g en banc*, 633 F.3d 723 (9th Cir.), *cert.*
14 *denied*, 565 U.S. 816 (2011). Both fact and law continue to favor World Vision here.
15

16 Neither of Plaintiff’s claims withstands summary judgment. First, her Title VII
17 claim (under *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020)) and her WLAD claim both
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21 ¹ Hardback copies of this illustrated NIV Bible featuring WV’s work as a response to Scripture
22 (“WV Bible”) were distributed to counsel and filed with the Court. Dkt. 22. *See also* Freiberg
Decl. (Dkt. 28) at ¶29 (discussing and authenticating the WV Bible).

23 ² WV’s document nomenclature remains: (a) Declarations are denoted as Scott Ward’s (“SW”),
24 Melanie Freiberg’s (“MF”), and Shannon Osborne’s (“SO”); (b) their authenticated exhibits are
25 denoted, e.g., **SW-01** for SW-Exhibit 1; and (c) references to a paragraph incorporate Exhibit(s)
26 referenced in that paragraph, e.g., **MF ¶7** incorporates Exhibits MF-01 and MF-02 therein.
27 When referring to any of the five depositions taken in this case, WV will use the exhibits to
Plaintiff’s MSJ, which attached full, authenticated transcripts of all five depositions. *See* Pls.
MSJ at 2 n.1 (“All exhibits cited herein (i.e., as ‘Exh. __’) are references to exhibits attached to
the Declaration of Casimir Wolnowski” [Dkt. 25.]). For example, the deposition of Christine
Talbot, which is Exhibit 12 to Dkt. 25, is referenced herein as “**Talbot Dep. (Dkt. 25-12) at __.**”

are inextricably premised on her quarrel with WV's Biblical understanding of Christian love and marriage—a religious dispute beyond court jurisdiction. Second, even if the First Amendment did not bar this lawsuit altogether, it compels dismissal of both claims on several complementary but independent grounds. Third, in any event, Title VII and WLAD each contain a religious organization exemption (“ROE”) to protect such “religious convictions.” 140 S.Ct. at 1753-54. Each such ground alone is sufficient to deny Plaintiff summary judgment and to dismiss her Complaint. No other outcome is possible unless every such ground is resolved against World Vision. This case should be dismissed with prejudice.

B. No Genuine Issue of Fact Exists, Only a Difference of Religious Opinion.

This case presents only “undisputed facts” and “differences of opinion” on a religious question.³ Nothing more. Plaintiff freely described this difference of religious opinion in her deposition testimony. Her MSJ says nothing about it, likely because she now fears it may doom her lawsuit. It does doom her lawsuit, as World Vision has explained. *See* Defs. MSJ (Dkt. 26) at 11-12.

World Vision defines Christian love and marriage from the Bible, which WV holds to be the authoritative Word of God. *See id.* at 7. WV seeks to honor God by seeking to employ those who seek to follow Him, individually and corporately, in faith and conduct, publicly and privately, in accordance with His Word. *See id.* Thus, WV requires that staff behavior be consistent with the teachings of Scripture. Since it is not

³ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2056 n.1 (2020) (“*OLG*”) (summary judgment ignores “differences of opinion on certain facts”).

1 possible, in WV's view, to identify every form of behavior the Bible defines as
2 acceptable or unacceptable to God, WV provides Standards of Conduct to clarify
3 expectations and assist job candidates and employees in deciding whether WV is the
4 right place for them to serve God. One such form of behavior is sexual conduct. *See id.*

5
6 For World Vision, sexual conduct is inseparable from marriage. WV
7 understands the Bible to define marriage as a covenant between a man and a woman
8 and to intend and direct that all sexual expression of human love occur within such a
9 covenant. *See id.* at 7-8. That is, the only Biblically approved setting for human sexual
10 conduct is within a monogamous heterosexual marriage. *See id.*⁴ Sexual conduct
11 outside this Biblical covenant—sexual activity with someone other than a spouse of
12 the opposite sex—falls short of God's will and design and, like any other sin, requires
13 repentance. *See id.* WV believes "all have sinned" but that Christians, when they sin,
14 are to return to God in repentance and receive His forgiveness. To WV, SSM reflects
15 open, ongoing, unrepentant sin contrary to its deeply held belief that marriage is a
16 Biblical covenant between a man and a woman. *See id.*

17
18 Plaintiff disagrees. *See id.* at 8. Like World Vision, she professes Christianity.
19
20 But she believes that marriage, from "a religious standpoint," is defined simply by
21 "who you love," Pls. Dep. (Dkt. 25-9) at 21, and she seems to equate all expressions of
22 love with her understanding of the "unconditional love of Jesus." *Id.* at 182-85. She
23 sees the Biblical doctrine of marriage held by WV as "hate" — the opposite of the "love
24
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27 ⁴ *See also, e.g.,* C.S. Lewis, MERE CHRISTIANITY 95-103 (Macmillan 1952) (explaining *Christian Marriage* in his Book on Christian Behaviour as the "right working" of "sexual impulse").

1 of Jesus” – as expressed by her product design, “Love Is A Terrible Thing To Hate.”
 2 *See id.* at 77 (“[M]y T-shirt design ... ‘Love is a terrible thing to hate’ ... exemplifies ...
 3 my definition of marriage.”).⁵ The pervasiveness of this Biblical doctrine in many
 4 churches was the reason Plaintiff’s wife stopped attending church. *See id.* at 100.

6 Plaintiff sees no “Bible verses or teachings ... around marriage” that disqualify
 7 or refute her position, *id.* at 22, which she views as consistent with the essentials of
 8 Christian theology. *See id.* at 165, 164 (“God is my creator[;] He died to forgive my sins
 9 and I want to live for him, do good for him, keep him as the center of my life – I think
 10 that is the most important part”; “to keep Christ central in our individual and
 11 corporate lives [is] a huge important aspect”). She rejects the “interpretation that some
 12 people have of the Bible,” which “has been engrained in some faith communities,” and
 13 reproves them for not “taking into consideration [other] parts of the Bible.” *Id.* at 96-
 14 97. She holds a different view of what the “unconditional love of Jesus” means, *id.* at
 15 183-84, a “very different understanding what the Bible says,” *id.* at 97-98. On these
 16 theological points, she believes WV’s understanding is “very wrong”:
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 18

19 Q: Is it fair to say that you think World Vision has a wrong under-
 20 standing of the unconditional love of Jesus?

21 A: Yeah. Yeah, I think that – yeah, because they’re putting conditions on it.

22 Q: [T]hat’s pretty central to your disagreement with World Vision that’s
 23 at issue in this lawsuit. Is that fair?

24 A: What part?

25 Q: The idea that you and World Vision have different understandings of
 26 the unconditional love of Jesus.

27 ⁵ *See also id.* at 95, 99. “A: [I’d] never want somebody to feel like they’re less [worthy] because of who they love. Like that shirt, ‘Love is a terrible thing to hate[.]’” *Id.* at 95. “Q: [L]ike your shirts say, Love Is a Terrible Thing to Hate, you’ve got some principles ... guiding you and you’re ... up front about them. A: Yeah.” *Id.* at 99. *See also* Defs. MSJ at SW ¶7 & Dkt. 27-4.

1 A: Now, yes.

2 Q. Fairly central to the lawsuit [is] your sense that World's Vision's
3 understanding of the unconditional love of Jesus is wrong. Is that fair?

4 A. I don't agree with it ... I don't agree with it [F]or me it seems very wrong
5 that World Vision is claiming [that view].⁶

6 This difference of religious opinion and exegesis is the sole material
7 disagreement of fact. Plaintiff has testified to it. Its existence is indisputable and is
8 indisputably toxic to civil court jurisdiction. *See* Defs. MSJ (Dkt. 26) at 11-12; *Serbian*
9 *Eastern Orthodox v. Milivojevich*, 426 U.S. 696, 713 (1976); *Demkovich v. St. Andrew*, 3
10 F.4th 968, 981 (7th Cir. 2021) (en banc). "Most district courts to consider [this issue]
11 have treated it as *jurisdictional*."⁷ This case should be dismissed with prejudice.

12 C. As No Genuine Issue of Fact Exists, Summary Judgment is Proper.

13 If this case is justiciable at all, it should be resolved on summary judgment. No
14 material facts are in dispute, as Plaintiff fully agrees. "It is undisputed that Defendant
15 rescinded its job offer to Plaintiff for the position of customer service representative
16 because it learned she was in a same-sex marriage." Pls. MSJ (Dkt. 24) at 1. Specifically,
17 Plaintiff's offer was "rescinded on the basis of the 'inability for [Plaintiff] to meet one
18 of the fundamental requirements of employment with [Defendant], which [was]
19 affirming and complying with the standards of conduct which were described in the
20 interview process ... in that she was in a same-sex marriage.'" *Id.* at 4 (quoting Talbot
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25 ⁶ Pls. Dep. (Dkt. 25-9) at 183-85 (emphasis added).

26 ⁷ *Moon v. Moon*, 431 F.Supp.3d 394, 404 (S.D.N.Y., 2019), *aff'd as modified*, 833 Fed.Appx. 876 (2d
27 Cir. 2020), *cert. denied*, 141 S.Ct. 2757 (2021) (citations omitted; emphasis added). The rule could
hardly be otherwise; courts must not entertain what is essentially a religious dispute.

1 Dep., Dkt. 25-12, at 58, 29). This “was the one and only reason.” *Id.*⁸

2 To be clear, this one reason has three aspects, as World Vision has explained.
3
4 See Defs. MSJ (Dkt. 26) at 9. First, the actions of entering into and living in a SSM defy
5 World Vision’s religious understanding of and conduct standards regarding Biblical
6 marriage. Second, the action of living openly in a SSM embodies an ongoing public
7 stance promoting such conduct. Third, these actions evince sexual conduct contrary to
8 WV’s religious beliefs and conduct standards. *See id.*; *see also* MF (Dkt. 28) at ¶49.
9

10 World Vision has earnestly pursued clarity on these points. It welcomes job
11 applicants of any sexual orientation so long as they agree with its statement of faith
12 and comply with its conduct policies. *See* Defs. MSJ at 8 n.8 (citing MF (Dkt. 28) at ¶45
13 and policies therein). It actively seeks staff who live out Biblical standards of conduct.
14 It expects all staff, whatever their sexual orientation, to live by these standards,
15 including remaining celibate outside of Biblical marriage: i.e., a Biblical covenant
16 between a man and a woman. *See id.* This stance embodies WV’s interpretation of
17 Scripture and is made clear to all job applicants. *See id.*
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20 Aspects one and three above are two sides of the same coin. Openly entering
21 into and living in a SSM openly defies or flaunts World Vision’s deeply held religious
22 beliefs and policy regarding Biblical marriage.⁹ A SSM also reflects ongoing violation
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25 ⁸ WV accepts this “one and only” label for purposes of this motion. *See* Talbot Decl. (Dkt. 25-
26 12) at 58 (“I don’t recall any other reason that that offer would have been rescinded.”).

27 ⁹ *See supra* at 2-3; Defs. MSJ at 7-9; *see also, e.g.*, Aubry McMahon and Jaclyn Foreman’s
Wedding Website, accessed 2/23/2023, <https://www.zola.com/wedding/jaclynandaubry>.

1 of the conduct standards about sexual conduct, as WV's presumption that marriage
 2 and sexual conduct are intertwined remains unrebutted in this case. Each of these two
 3 aspects provides an independent ground for rescission of Plaintiff's offer. These two
 4 aspects are woven throughout WV's policies. *See, e.g.*, Defs. MSJ at 6-9, 12-23, SW-06
 5 (Dkt. 27-6), MF ¶¶ 19-60 & MF-09 to MF-35, SO (Dkt. 29) ¶¶ 13-57 & SO-03 to SO-19.
 6

7 Regarding aspect two, living openly in a SSM embodies an ongoing public
 8 stance promoting such conduct in at least two ways. First, as Plaintiff testified, the
 9 public image of her SSM promotes a specific stance. For example, her products Web
 10 page depicts her SSM to promote her products with a pro-SSM message. *See* Defs. MSJ
 11 at 14 n.12 & Dkt. 27-2 to 27-5.¹⁰ Second, Plaintiff testified that she actively advocates
 12 for SSM. In addition to the words on her products and designs, Plaintiff provided other
 13 examples of her verbal efforts to "advocate" and "raise awareness." Pls. Dep. (Dkt. 25-
 14 9) at 63-85. As to the intensity of such efforts, she and her wife are pursuing this very
 15 lawsuit "because we felt [obligated to do so] as advocates [of] the LGBTQ community,"
 16 *id.* at 242, "so much so [that] when World Vision offered us a settlement [we] said we
 17 are not taking it." *Id.*¹¹ Plaintiff's advocacy is frequent and bold, and it cuts across
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22 ¹⁰ *See also* Bonfire, *Just Be*, <https://www.bonfire.com/store/just-be> (Plaintiff's sales page
 23 listing and linking 30 products with designs, images, and words advocating her views).
 24 Plaintiff authenticated and discussed her Bonfire page and products. *See* Pls. Dep. (Dkt. 25-9)
 25 at 70-81. The public image of her SSM is itself a nonverbal message. *See, e.g., id.* & *id.* at 64, 68-
 69 (describing how the public knowledge and image of her SSM affects her wife's students).

26 ¹¹ Within hours of losing the WV job offer, Plaintiff posted to Facebook, seeking "a legal person
 27 I could talk with." Pls. Dep. (Dkt. 25-9) at 247. She did not deny that her Facebook post
 generated over 100 responses before it was taken down. *See id.* at 247-49. Plaintiff is passionate
 about her views. *See, e.g., id.* at 185 ("I'm sorry. I feel like I'm getting on a rant").

1 various media.¹²

2 Thus, WV would have reached the same staffing decision once Plaintiff's public
3 stance came to light. *See, e.g., Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 & n.3 (7th
4 Cir. 1987) (given plaintiff's "pro-abortion stance," employer "would have reached the
5 same decision even if she were a man") ("*Maguire*"). Plaintiff admits she is a "vocal
6 advocate for a conflicting viewpoint." *Green v. Miss USA*, 52 F.4th 773, 805 (9th Cir.
7 2022) ("*Green*") (VanDyke, J., concurring) ("Green is not a biological woman – and as
8 explained in the majority opinion, is a vocal advocate for a conflicting viewpoint.").
9 She regularly has "publicly engaged in conduct regarded by [WV] as inconsistent with
10 its religious principles." *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991); *accord Hall v.*
11 *Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 627 (6th Cir. 2000) (plaintiff helped lead
12 a group "that publicly supported homosexual lifestyles, a view that clashed with the
13 [denomination's public position] and the College's avowed mission").
14

15 II. LEGAL STANDARDS GOVERNING SUMMARY JUDGMENT *HERE*.

16 Plaintiff does not fully and correctly state the current legal standards for
17 summary judgment in this religious employment discrimination case.
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19 A. MSJ re Disparate Treatment: *Opara v. Yellen* (9th Cir. 2023).

20 First, Plaintiff fails to cite the Ninth Circuit's recent standards governing
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25 ¹² *See* @GruenWeddings, <https://twitter.com/GruenWeddings/status/1109508257565966337>
26 ("Wedding Experts Live Podcast" "joined today by Aubry McMahon who says she [was]
27 rejected by [a] wedding venue"); David Sentendrey, *Lesbian Couple Says SC Venue Turned Them*
Away, Queen City News (Mar. 6, 2019), [https://www.qcnews.com/news/lesbian-couple-](https://www.qcnews.com/news/lesbian-couple-says-sc-wedding-venue-turned-them-away)
[says-sc-wedding-venue-turned-them-away](https://www.qcnews.com/news/lesbian-couple-says-sc-wedding-venue-turned-them-away) (TV news interviews of Plaintiff and her wife).

summary judgment in disparate-treatment cases such as this. *Opara v. Yellen*, 57 F.4th 709 (9th Cir. 2023) (“*Opara*”) clarifies the precise standards applicable to this case, as explained by World Vision. *See infra* at 9-11; Defs. MSJ (Dkt. 26) at 13-16.

B. MSJ re First Amendment: *Our Lady of Guadalupe* (S.Ct. 2020).

Second, while Plaintiff correctly notes the importance of the Supreme Court’s recent precedent on the First Amendment defense of ministerial exception (and its parent doctrine of religious autonomy), she fails to note its significance for deciding summary judgment in this context. *OLG* clarified the summary judgment standards in this precise situation, where “differences of opinion on certain facts” are immaterial and only “*material* fact[s that are both] genuinely in dispute” and “essential to [the] holding” can defeat summary judgment. 140 S.Ct. at 2056 n.1.

III. RESPONSE TO EACH OF PLAINTIFF’S ARGUMENTS.

The following sections address each section of Plaintiff’s Argument in turn.

A. Plaintiff Cannot Establish Her Claims As a Matter of Law.

1. No Sex or Sexual Orientation Discrimination in this Case.

To prevail on her MSJ, Plaintiff must first establish all required elements of at least one of her two disparate-treatment claims under the standards of *Opara* and *OLG*. Plaintiff makes no attempt to fulfill the standards of either case and both of her claims are insufficient to proceed, *see* Defs. MSJ at 13-16, as further explained below.

a) No Sex and Sexual Orientation Discrimination Here.

Plaintiff misapprehends the role of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (“*MD*”). She is partially correct when she states that a “plaintiff does not have

1 to rely on the *McDonnell Douglas* framework to prove a case of disparate treatment.”
 2 Pls. MSJ at 5. The correct statement, under *Opara*, is that a “plaintiff does not have to
 3 rely on the *McDonnell Douglas* [factors for Steps One and Three] to prove [*those Steps*
 4 in] a case of disparate treatment.” *Opara* allows an alternate approach to *those Steps*.

6 *Opara* actually doubles down on the “three-step framework” of MD in all
 7 disparate treatment cases under Title VII or ADEA: “(1) Step One: The Prima Facie
 8 Case,” “(2) Step Two: Legitimate, Nondiscriminatory Reason,” and “(3) Step Three:
 9 Pretext.” 57 F.4th at 721-24. While *Opara* makes the use of the MD “factors” optional
 10 for Steps One and Three, *Opara* still requires all three MD Steps. “Under either
 11 approach, staving off a motion for summary judgment on disparate treatment claims
 12 under ADEA or Title VII entails three steps.” 57 F.4th at 721. “[R]egardless of the
 13 approach a plaintiff takes on step one – i.e., establishing the prima facie case via direct
 14 or circumstantial evidence or the *McDonnell Douglas* factors – once an employer
 15 articulates some legitimate, nondiscriminatory reason for the challenged action, the
 16 employee must show that the articulated reason is pretextual.” *Id.* at 723.¹³

19 Plaintiff fails this three-step test. Under Step One, she cannot establish a prima
 20 facie case under either approach to Step One: her class and activity are not protected;
 21 her conduct disqualifies her for the position; similarly situated applicants are not
 22 treated differently; and, relatedly, causation is lacking. *See* Defs. MSJ at 13-14. Even if
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26 ¹³ “Here too, a plaintiff can prove pretext in multiple ways: [essentially MD factors].” *Id.* (citing
 27 *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1123 (9th Cir. 2004) as “discussing pretext showing
 in Title VII case utilizing *McDonnell Douglas* factors.”).

1 she could, WV has articulated a legitimate, nondiscriminatory reason under Step Two
 2 that cannot be rebutted as pretext under Step Three, because pretext inquiry is
 3 prohibited here under any approach. *See id.* at 14-16. WV has presented “convincing
 4 evidence” that its policy is based on religious precepts, precluding “investigat[ion of]
 5 pretext.” *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1366 (9th Cir. 1986). “[W]e will
 6 not subject to examination the genuineness of a proffered religious reason for an
 7 employment action.” *Rweyemamu v. Cote*, 520 F.3d 198, 207 (2d Cir. 2008). Plaintiff
 8 “cannot carry [her] burden at step three by instigating a debate over whether [WV]
 9 really believes its position on marriage, or what [its] precise contours [are.]” *Butler v.*
 10 *St. Stanislaus Kostka Cath. Acad.*, 609 F.Supp.3d 184, 201 (E.D.N.Y. 2022).¹⁴

13 Even if pretext inquiry were permitted, there is nothing in the record “creating
 14 a genuine issue as to whether [WV’s] proffered reasons were ‘false’ or whether her
 15 termination was due in whole or in part to her [sex].” *Opara*, 57 F.4th at 729; *see OLG*,
 16 140 S.Ct. at 2056 n.1 (material fact must be “genuinely in dispute”); Defs. MSJ at 15-16.
 17 In the face of “abundant and uncontroverted” evidence, “plaintiff’s creation of only a
 18 weak issue of fact as to whether the employer’s reason was untrue will not suffice.”
 19 *Opara*, 57 F.4th at 724 (citations and internal punctuation omitted). Here, there is not a
 20 weak issue; there is no issue. WV produced “abundant and uncontroverted” evidence
 21 that the reason for its staffing decision was its sexual conduct standard. Indeed,
 22 Plaintiff embraces this as the “one and only reason,” *see supra* at 5-6, and nowhere
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27 ¹⁴ *Appeal dismissed* (2d Cir. Aug. 26, 2022).

1 suggests a motive other than WV's understanding of Biblical marriage.

2 **b) The Theory of Plaintiff's Case Is Flawed.**

3 The proper result here flows inexorably from Plaintiff's flawed theory of the
4 case. Plaintiff appears to conflate "sexual orientation" or "being homosexual," Pls. MSJ
5 (Dkt. 24) at 6, with sexual activity or conduct. That was not the holding of *Bostock*. See
6 Defs. MSJ at 13-16. Regardless, religious freedom guarantees that arise from or enforce
7 the First Amendment must supersede Title VII's commands in appropriate cases.
8

9 *Bostock* did not disturb religious conduct policies such as World Vision's. In the
10 Court's own words, its "holding [was] that employers are prohibited from firing
11 employees on the basis of homosexuality or transgender status." *Id.* at 1753. The Court
12 was unequivocal: "The only question before us is whether an employer who fires
13 someone simply for being homosexual or transgender [has] discriminated against that
14 individual 'because of [their] sex.'" *Id.* (quoting Title VII).
15
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17 To be clear, "*Bostock* does not protect sexual conduct; it protects employees from
18 being treated differently based on their biological sex, which is an immutable
19 characteristic distinct from sexual conduct itself." *Bear Creek Bible Church v. EEOC*, 571
20 F.Supp.3d 571, 623 (N.D.Tex. 2021) (citing *Maner v. Dignity Health*, 9 F.4th 1114, 1123
21 (9th Cir. 2021)), *appeal argued sub nom., Braidwood Mgt. v. EEOC* (5th Cir. Feb. 7, 2023).¹⁵
22 As the Ninth Circuit recognized in *Maner*, "*Bostock* does not necessarily extend to
23 'sexual activity.'" *Id.* (quoting *Maner*, 9 F.4th at 1123). Since, like many religious
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27 ¹⁵ Argued Feb. 7, 2023 before Smith, Clement, & Wilson, JJ.

1 employers, WV disapproves “premarital sex, adultery, and any other kind of sexual
2 activity that occurs outside the context of a marriage between a man and a woman[,
3 and not just] homosexual conduct, the Court [should rule] that so long as the
4 prohibitions apply evenly to men and women, [WV] does not favor one biological sex
5 over the other, and therefore does not violate Title VII.” *Bear Creek*, at 623.

7 Fundamentally, Plaintiff’s opinion ignores the view of World Vision (and much
8 of traditional Christian and other religions) that God holds humans accountable for
9 their conduct regardless of orientations or predispositions inherent in their fallen
10 natures. Adherence to this view surely is the “free exercise of religion.” In fact, “it must
11 be emphasized that religions, and those who adhere to religious doctrines, may
12 continue to advocate with utmost, sincere conviction that, by divine precepts, same-
13 sex marriage should not be condoned.” *Obergefell v. Hodges*, 576 U.S. 644, 679 (2015).

16 What seemingly is lost in Plaintiff’s arguments is the idea of choice. Conduct is
17 no more immutable than it is predetermined. Men and women of any orientation can
18 choose celibacy, as some have, for various reasons, throughout history. As World
19 Vision has explained with deep love and humility, it welcomes people of all sexual
20 orientations so long as they agree with its statement of faith and abide by its standards
21 of conduct. *See supra* at 6. Such a position, held by many and grounded in deeply held
22 religious convictions of long standing, assumes and requires choice.¹⁶

26
27 ¹⁶ All societies forbid certain forms of sexual conduct to which some people may be naturally
oriented, for various reasons, e.g., age, vulnerability, or biological relationship.

1 Plaintiff mischaracterizes World Vision's staffing decision as based on her sex
 2 or sexual orientation. Plaintiff probed WV's decision thoroughly during the 20-month
 3 discovery period, yet there is no material factual dispute about it. WV's decision was
 4 based on its conduct standards, including sexual conduct standards, applicable to all
 5 staff and to men and women equally regardless of sexual orientation. *See* MF (Dkt. 28)
 6 at ¶¶44-45. As WV understands the Bible, Christians must confine their sexual conduct
 7 to Biblical marriage, or abstain. If and when they fail, WV believes they must turn away
 8 from such behavior. If Plaintiff had agreed to abide by, and then (with God's help)
 9 abided by, these standards for all staff, repenting when she failed, she could work for
 10 WV. She admittedly did not agree, nor abide, but instead has disagreed with WV's
 11 Christian theology underlying its standards. She is free to disagree but not to compel
 12 World Vision to replace its beliefs with her beliefs by employing her.
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16 **2. No Marital-Status Discrimination in this Case.**

17 Plaintiff cannot establish marital-status discrimination for the same reasons she
 18 cannot establish sex or sexual orientation discrimination, as explained above. As
 19 Plaintiff concedes, "Marital status" is the legal status of being "married, single,
 20 separated, divorced, or widowed." Pls. MSJ at 9. WV's employment decision was not
 21 based upon Plaintiff being "married" or "single" but rather Plaintiff's non-compliance
 22 with WV's standards of conduct for all employees, whether "married, single,
 23 separated, divorced, or widowed." And even if Plaintiff could establish marital-status
 24 discrimination, such a claim likely must yield to religious freedom guarantees. *See infra*
 25 at 20-31; Defs. MSJ (Dkt. 26) at 20-34; *see Bostock*, 140 S.Ct. at 1753-54.
 26
 27

B. Plaintiff Cannot Overcome Each and Every WV Affirmative Defense.

Plaintiff asserts that World Vision's 18-page Answer and Affirmative Defenses (Dkt. 14) lacked sufficient detail to support its affirmative defenses. *See* Pls. MSJ at 10. Plaintiff overlooks the purpose of notice pleading. "As its name implies, notice pleading ... aims to produce a general chart of possible claims and defenses available to the parties before they embark on the voyage of litigation." *Harris v. Sec'y of U.S. Dep't of V.A.*, 126 F.3d 339, 343 (D.C. Cir. 1997). "The *fair notice* pleading requirement is met if the defendant 'sufficiently articulated the defense so that the plaintiff was not a victim of unfair surprise.'" *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999) (citation omitted). These standards are not new. Neither are Plaintiff's assertions.

This Court has not been sympathetic to such assertions. "Thus, the Court declines to apply a heightened pleading standard to affirmative defenses[. T]he Court is unable to conclude that, given a standard enumeration of common defenses against facts familiar to HP, HP does not have fair notice of the general nature of the defenses. The Court therefore denies HP's request to strike the eleven defenses for lack of factual basis[.]" *HP Tuners, LLC v. Sykes-Bonnett*, No. C17-5760 BHS, 2018 WL 10398218, at *2 (W.D.Wash. Oct. 11, 2018) (citations omitted). In this case, WV's pleading "alleged [43] affirmative defenses. [It] was an appropriate response to the Complaint, and raises possible defenses that will, in time, be dismissed or stricken[.]" *Bell v. Addus Healthcare*, No. C06-5188 RJB, 2006 WL 2222350, at *1 (W.D.Wash. Aug. 2, 2006).

Neither does Plaintiff even mention that World Vision explained its Affirmative Defenses in detail in its 60-page Responses to Plaintiff's First Set of Interrogatories

1 (“Defs. RPFISI”), served on May 6, 2022. In response to Plaintiff’s Interrogatory No. 11
 2 (“Separately for each affirmative defense set forth in Defendant’s filed Answer identify
 3 the factual basis for such defense.”), *id.* at 24, WV provided detailed explanation of
 4 each defense. For example, in response to “Affirmative Defense No. 1 based upon the
 5 religious employer exemption(s) provided in 42 U.S.C. § 2000e-1(a),” WV provided
 6 four pages on how and why Title VII’s ROE applied to this case. *See* Defs. RPFISI at 26-
 7 29. As to Defense No. 2 (BFOQ), WV provided more than a full page. *See id.* at 29-31.
 8 And so on, through Defense No. 43 (Fraud). *See id.* at 56.

11 In all, World Vision explained its Affirmative Defenses over six pages in its
 12 responsive pleading served August 4, 2021 (Dkt. 14 at 12-17) and another 32 pages in
 13 its responsive discovery served May 6, 2022 (Defs. RPFISI at 24-56).¹⁷ These 38 pages,
 14 which Plaintiff has had for a full year, gave her more than fair notice to “embark on
 15 the voyage of [this] litigation.” *Harris*, 126 F.3d at 343. On her view, notice pleading
 16 would morph into and obviate (hopelessly premature) dispositive motions.

18 To prevail on her MSJ, Plaintiff first must establish at least one of her two claims
 19 and then must overcome each and every affirmative defense. Plaintiff argues against
 20 just six of World Vision’s 43 affirmative defenses, namely the (a) Title VII ROE, (b)
 21 Ministerial Exception, (c) BFOQ defense, (d) religious autonomy and any other
 22 constitutional defenses, (e) WLAD ROE, and (f) RFRA. Without argument, she asserts
 23
 24

26 ¹⁷ From May 6, 2022, she still had another ten months before the March 13, 2022 discovery cut-
 27 off, during which she took four depositions (including Rule 30(b)(6)) and served additional
 discovery requests. If she did not take advantage of this time, that was her decision.

1 that every other affirmative defense, including “[a]ny other constitutional defense[,]

2 fails as a matter of law.” Pls. MSJ (Dkt. 24) at 23-24. Her broad assertion is simply

3 wrong. World Vision will address below each of Plaintiff’s separately identified

4 arguments in the order she presented them.

5

6 **1. Plaintiff Cannot Overcome Title VII’s ROE.**

7 Plaintiff devotes one page to Title VII’s Religious Organization Exemption

8 (“ROE”). See Pls. MSJ at 11-12. World Vision thoroughly refuted these arguments, see

9 Defs. MSJ at 16-20, which fail for several independent reasons.

10

11 First, Plaintiff ignores the statute’s language. She quotes the opening words of

12 42 U.S.C. § 2000e-1(a) – “This subchapter shall not apply” – and then ignores them,

13 negating *Bostock*’s logic that Title VII’s words control. “*This subchapter* refers [to] all of

14 Title VII.” *Starkey v. Roman Cath. Archdiocese*, 41 F.4th 931, 946 (7th Cir. 2022)

15 (Easterbrook, J., concurring). Thus, *none* of Title VII applies to a qualifying religious

16 entity, which *Spencer* has already held World Vision is. See Defs. MSJ at 2-5, 16-20. The

17 statute is clear, its “plain” “meaning” controls, and “our job is at an end.” *Bostock*, 140

18 S.Ct. at 1749. It is “‘our job to apply faithfully the law Congress has written,’ and ‘[w]e

19 cannot replace the actual text with speculation as to Congress’ intent.’” *Luna Perez v.*

20 *Sturgis Pub. Sch.*, 143 S.Ct. 859, 865 (2023) (unanimous) (citations omitted).

21

22 Like the dicta in some cases, Plaintiff never explains “why *this subchapter* means

23 something less than all of Title VII.” *Starkey*, 41 F.4th at 946 (Easterbrook, J.).

24 Regardless, the Ninth Circuit has held that the ROE exempts qualifying entities “from

25 the *entire subchapter* of Title VII.” *Garcia v. Salvation Army*, 918 F.3d 997, 1004 (9th Cir.

26

27

2019) (citation omitted). The ROE applies to Plaintiff's sex-related claims precisely as *Bostock* contemplated. *Bostock*, at 1753-54 (presuming the ROE is available in "cases like ours," i.e., sex claims just like Plaintiff's). Thus, the ROE precludes Plaintiff's claim.

Second, and additionally, this "plain meaning 'becomes even more apparent when viewed in' the broader statutory context." *Babcock v. Kijakazi*, 142 S.Ct. 641, 645 (2022) (citation omitted). Title VII defines "religion" broadly to "include[] all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). So, a "straightforward reading of § 2000e-1(a), coupled with § 2000e(j), shows [WV] was entitled to [rescind Plaintiff's offer] without regard to any of the substantive rules in Title VII." *Starkey*, 41 F.4th at 946 (Easterbrook, J.). This "straightforward reading" of the ROE permits "religious employer[s] to require the staff to abide by religious rules," *id.*, to enable them to "define and carry out their religious missions." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987). "Thus, a religious employer is not liable under Title VII when it refuses to employ an individual because of sexual orientation or gender expression, based on religious observance, practice, or belief." *Bear Creek*, 571 F.Supp.3d at 591. A contrary rule is "inconceivable." *Id.* (citation omitted).

Third, and additionally, the ROE's "structure ... supports this interpretation." *Id.* at 591. The "alien" exemption that is paired with the ROE "provides no limitation." *Id.* (citing 42 U.S.C. § 2000e-1(a)). "If the [ROE] were somehow limited only to certain types of Title VII claims (i.e., of religious discrimination), one would expect the alien exemption to have a parallel limitation (i.e., claims of race or national-origin discrimination)." *Id.* (citation omitted). "Without such limitations, the [ROE] must be

1 read equally broadly.” *Id.* Thus, the alien exemption “has been understood to mean
 2 what it says: *none* of Title VII’s substantive rules applies to aliens covered by [it]. What
 3 is true for the alien exemption must be true for the religious exemption as well.”
 4 *Starkey*, 41 F.4th at 947 (Easterbrook, J.) (citation omitted); *see also* Defs. MSJ at 18.

6 Fourth, and additionally, familiar rules of constitutional avoidance compel this
 7 result. “[A]n Act of Congress ought not be construed to violate the Constitution if any
 8 other possible construction remains available.” *NLRB v. Cath. Bishop*, 440 U.S. 490, 500
 9 (1979) (citing Chief Justice John Marshall). Citing *Cath. Bishop*, among other cases,
 10 *Spencer* decided this question. “Thus, the cramped reading of the [ROE] put forth by
 11 [Plaintiff] raises serious questions under both the Free Exercise Clause and the
 12 Establishment Clause. As we must, we reject this constitutionally questionable
 13 interpretation.” *Spencer*, 633 F.3d at 729. Plaintiff’s claim cannot survive the ROE.

16 Plaintiff makes only two arguments, one implausible and the other frivolous.
 17 The frivolous argument is that *Spencer* constitutes “settled law in the Ninth Circuit that
 18 [the ROE] bars only *religious* discrimination claims brought against a religious
 19 employer.” Pls. MSJ at 11. *Spencer* constitutes no such thing. It held the ROE applies to
 20 World Vision as an organization because WV is sufficiently religious in character and
 21 purpose to qualify for the **Religious Organization Exemption**. *See* Defs. MSJ at 2-5.

23 The implausible one is this. Plaintiff cites *Fremont Christian* and *EEOC v. Pac.*
 24 *Press Pub. Ass’n*, 676 F.2d 1272 (9th Cir. 1982) for their 40-year-old dicta that the ROE
 25 covers only religious discrimination claims. These cases do not apply here because
 26 neither involved a credible claim of a religiously motivated staffing decision. Thus,
 27

neither analyzed the ROE and neither had occasion to render any applicable holding. Their dicta lacks any force now, following *Amos*, *Spencer*, *Garcia*, and *Bostock*.¹⁸

2. *Plaintiff Cannot Overcome the Ministerial Exception (“ME”).*

Plaintiff has never understood the role she sought. In November of 2020, by her own evidence, she responded to a job posting that included these duties:

Help carry out our Christian organization’s mission, vision, and strategies. Personify the ministry of World Vision by witnessing to Christ and ministering to others through life, deed, word and sign. You will also ... Keep Christ central in our individual and corporate lives. Attend and participate in the leadership of devotions, weekly Chapel services, and regular prayer.... Be sensitive to Donor’s needs and pray with them when appropriate.

Job Posting, 2020 (P0013-15); *see also* Pls. Dep. (Dkt. 25-9) at 147-48 (authenticating and discussing this Job Posting, attached to her Dep. as Exh. 8).¹⁹ Yet, in July of 2021, she alleged in her Complaint that her role “was essentially going to be working in a call center [without] any religious duties [or] any duties that can be characterized as ‘religious.’” Compl. (Dkt. 1) ¶¶5.7, 5.10. There appears to be a disconnect here.²⁰

Plaintiff then had 20 months of discovery, including a 30(b)(6) deposition of WV

¹⁸ *See also, e.g., Garcia*, 918 F.3d at 1004 n.11 (In *Pac. Press*, “[w]e did not hold that religion-based retaliation claims are beyond the reach of the ROE.”).

¹⁹ The Job Posting is among Plaintiff’s key evidence. It was produced at P0011-20. It was discussed at each deposition and made an exhibit to the first three. *See* Freiberg Dep. (Dkt. 25-13 & Exh. 1); Pls. Dep. (Dkt. 25-9 & Exh. 8); Miolla Dep. (Dkt. 25-11 & Exh. 1). It also was discussed at the 30(b)(6) deposition (Dkt. 25-10 at 11-13, 42-50), and was the subject of the latest written discovery. *See* Pls. 2d Doc. Reqs. (2/17/2023) and Defs. Resps. (WV6101-6112).

²⁰ Long before Plaintiff filed this lawsuit, both *Spencer* opinions described WV’s pervasively Christian workplace. *See* Defs. MSJ at 2-5. It is not clear what led Plaintiff to believe that DCS was a secular enclave within a pervasively Christian ministry that has its own Bible.

1 and 6,197 pages of documents produced by WV, to explore these religious duties. The
 2 evidence of the religious nature of these duties is both extensive, *see, e.g.*, Defs. MSJ at
 3 MF ¶¶19-60 (general) & SO ¶¶17-57 (specific), and undisputed – indeed, indisputable.
 4

5 Yet, her MSJ still mischaracterizes the role as well as the law. After quoting the
 6 full Job Posting, she quotes its explicitly religious duties before largely ignoring them.
 7 Pls. MSJ at 14-22. She asserts without facts that the role was largely devoid of religious
 8 training, Pls. MSJ at 15, despite extensive contrary evidence. *See, e.g.*, Defs. MSJ at MF
 9 (Dkt. 28) ¶¶34, 35, 53, 54, 55, 56, & 60 and SO (Dkt. 29) ¶¶20, 21, 23, 43, 45, & 46 (and
 10 the cited and attached policies and documents). It is doubtful that Jesus Christ Himself,
 11 or any of His Disciples, would qualify as ministers under the Plaintiff's wooden
 12 definition of the ministerial exception ("ME"). *See* Pls. MSJ (Dkt. 24) at 12-22. World
 13 Vision refuted this cramped and distorted view of the law in its MSJ (pp. 23-28), but
 14
 15 Vision refuted this cramped and distorted view of the law in its MSJ (pp. 23-28), but
 16 now highlights additional record evidence of the precise DCSR role she sought.

17 DCSRs perform ministerial duties as shown by five WV-wide chapel services
 18 led by DCS. *See* Defs. MSJ at MF (Dkt. 28) ¶52 & SO (Dkt. 29) ¶¶25-36.²¹ The service on
 19 June 26, 2019 shows exactly the role Plaintiff sought in 2020. *See* SO at 25-36 & SO-13
 20 (authenticating the videotape of this service and all excerpts that follow below). DCS
 21 opened this service with prayer and Bible reading (0:07-5:04) followed by DCSR
 22 messages (5:05-9:35), praise and worship time (9:36-20:45), DCSR testimonials (20:46-
 23 23:26), DCSR panel discussion (23:27-48:26), more testimonials (48:28-50:44), and
 24
 25

26
 27 ²¹ The underlying video recordings of these chapels were filed with the Clerk. Dkt. 23.

1 closing prayer (50:45-53:05). The excerpts below speak for themselves.

2 "[G]od brought us here [to DCS] to be the voice, face, and heart of World Vision
3 [to serve] our donors in the name of Jesus.... In the last year, donors called us over
4 210,000 times. We also called them over 100,000 times ... and ministered to our donors
5 through prayer. [We] replied to 51,000 emails and letters and prayed for nearly 10,000
6 prayer requests." (6:04-6:37)

8 I have been in call centers for 11 years, but nothing prepares you for [the]
9 prayer requests. One man said his sister-in-law passed away that very
10 morning. Several women just lost their husbands. Many people have
11 health and financial issues. However, the Lord cares for each one. I am
12 grateful and blessed for a chance to tell them how good the Lord is. I'm
13 grateful they trust me to share, and I'm blessed by how much
appreciation and love they give to myself and World Vision[.] [22:00-
22:30] [Video testimonial by a DCSR]

14 Below are responses from DCSR panelists to this question from the moderator:

15 "How has working [in] DCS impacted your faith and walk with Christ?"

17 [I've] always felt like working in DCS [really] puts us on the front lines
18 of World Vision. [We] openly discuss our stories, give our testimonies,
19 both to each other as friends, coworkers, and also to donors and have
20 them share their testimonies with us. [It] has been an incredible way to
21 witness Christ and everything that he's done for us as people, as an
22 organization, and for our donors. [24:35-25:29] Fellowship that we have
23 with coworkers and donors, it's so amazing. We're praying with each
24 other. We're praying with the donors. [27:26-27:33] [I]t's a calling to come
25 to World Vision [where we] actually pray for people all over the world
26 when we answer [the phone] and ask, Can I pray for you? And the
27 requests are just amazing. And then God gets to use us in a mighty way
to pray for our donors[.] When you work in a place that's also a ministry,
it just opens this fire for Jesus within you. [27:51-28:49] [I] believe the
Lord placed me [here this] last decade [and] simply remind[s] me to look
around and see his faithfulness[.] To see it in our donors [and] countless
stories of redemption ... around the world. We ... pray with our donors,
as you have heard from most every testimony from DCS today. We ...
pray for one another and we ... pray together for those who have

1 experienced devastation[.] [29:47-30:49]

2 Clearly, DCS is no common call center. “[I]n prayer, the donors share so many
3 things with us, as you’ve heard already. One family called [after a] terrible car
4 accident[. T]he mother and the son were injured very badly, and they called us for
5 prayer. Well, four months later, they called us back [and] were just in joy. They were
6 healed [and] really believed that our prayers for them helped them heal [and] put their
7 lives back together, and they just couldn’t wait to share [what] God had done in their
8 lives. So, God is everywhere in our work and he’s in our donors[.]” (39:16-39:58)
9
10

11 [Talking to donors allows us] to share what’s on our hearts and to be a
12 mouthpiece for our ministry. [40:45-40:54] I’m glad I get to be the
13 mouthpiece[.] I know that by opening up my mouth and allowing for the
14 Holy Spirit to flow like living water, this allows room for the donor to
15 know more about how they can actually help[.] Now, not everyone can
16 actually give, but [God] puts a calling in each and everybody’s heart, and
17 how they can serve. [I] also take mental notes [from] our chapels and
18 glean information that may be useful for when I’m talking to the donors.
19 Next, I pour out my heart to every [caller] because we just don’t know
20 [what they’re] going through[. 41:02-42:30] I love sharing World Vision’s
21 needs [with] our donors[. They] just love World Vision [and] I always
22 [tell] them what our need is. [They can] lift our need in prayer and if they
23 are able [to donate]. I thank them whether it’s monetary or prayer. And
24 at this time I usually hear lovely stories of how God has called them to
25 be prayer warriors or intercessor[s] and it’s [a]mazing to be able to open
26 my mouth and allow for the holy spirit to work. [42:46-43:42]
27

21 When DCSRs visit World Vision field offices, they often experience what they
22 as Christians view as taking their place in the global Church—the Body of Christ:
23

24 [I] had the life changing opportunity, like many of [us in DCS], to visit
25 our colleagues in Kenya. [Those] staff in the field [say] how thankful they
26 are—and the heroes we are to the children. [And] we protest and say,
27 How can you say that: you are the heroes; [you’re] literally serving the
children. And they say, But we [couldn’t] do any of that work if you
weren’t sending gifts halfway around the [world]. And we say, But we

wouldn't have anything to ask for if it wasn't for [the] incredible things [you are doing] with those funds. And they say, But we [couldn't] do anything if not for your generous donors. And we say, But you are the hands and feet of this organization. [And] they say, But you are the ears and mouths of this organization. And *that* is what it looks like for World Vision to be the body of Christ. [46:53-48:05] Being in DCS has been a faith-building experience because you can see God moving everywhere you look, from the obvious events in the field to the miracles of every day.... The miraculous is part of our culture [and] gives us hope daily. [48:26-48:51] Working in DCS has impacted my faith [and] I'm constantly reminded of the privilege I have to be the voice for those who are unable to speak up for themselves [whom] we serve in Christ. [50:27-40]

As a DCSR, Plaintiff's responsibilities would include praying faithfully with donors, as illustrated by ten donor calls entered in the record.²² In each of these 2020 calls, DCSRs prayed with donors about their needs and the needs of the children they sponsor. These donor needs included an elderly man's constant pain, a wife's kidney infection, a mother's biopsy, a recent widow's troubled daughter, a father's broken hip, a husband's safety as a doctor responding to Covid, a brother-in-law's wife going to hospice, a family dairy farm's fate, a church's desire to rebuild its youth ministry, and an emotional young woman "really worried that I'm going to lose my job." Consider this one example with a female donor, in April 2020, early into Covid:

Donor: "My uncle ... contracted the virus [and my mom] had to make the decision today to remove life support. So, please pray for my mom. [I]t's her big brother [and] it was sudden.... [I]f you guys could pray for my mom, I'd appreciate that very much."

DCSR: "[I]f you're comfortable, would you be okay if I prayed right now over the phone?"

Donor: "Yes. Definitely. That would be great."

DCSR: "Dear Lord, I just want to lift up [donor] and her family as well as her uncle specifically.... I pray for comfort and for healing for the

²² See 2020Call1-2020Call10 (Dkt. 23 & Dkt. 29-15) (private info redacted). "These ten samples reflect the more than 15,000 prayer requests recorded during ... 2020." SO (Dkt. 29) ¶37.

1 family, specifically for [her] mother as she goes through this time with
 2 her big brother.... [W]e pray for comfort and for support for this entire
 3 family.... So, thank you so much for your comfort, dear Lord, and we
 thank you for loving us, in Jesus' name. Amen."

Donor: "Amen. Thank you so much for that. I really appreciate that."

DCSR: "Of course [and] don't hesitate to give us a call [and] reach out[.]"

Donor: "Okay. Thank you so much. And I really – I really appreciate you
 5 calling. It was really well timed. So, thank you." [DCS Prayer Call, April
 6 1, 2020, at 0:53-3:50.]

7 Such prayer is expected and encouraged, as shown by sample "shout outs"
 8 from DCS managers. "Mr. [Donor was] overwhelmed when he shared [that female
 9 DCSR] prayed for him and showed him the love of the Lord on their phone call amidst
 10 his own personal trials he shared with her. He said he has never had such an amazing
 11 experience with an organization." WV3103. "Michael [Donor] was blown away [by
 12 DCSR, who] offered prayer [that] deeply touched [him.] Thank you [DCSR] for
 13 reminding donors we are a ministry ready to be God's hands and feet!" *Id.* at 3105.
 14 "Ms. [Donor called] leadership this morning to share [her] incredible [call with DCSR,
 15 who] prayed the most beautiful prayer over [her,] straight from the heart of Jesus." *Id.*
 16 at 3106. "Mrs. [Donor said she] was touched by [DCSR's] prayer [and] is incredibly
 17 thankful for [our] ministry." *Id.* at 3107. "Susanna [Donor] wanted us to know how
 18 amazing [DCSR] is. She said [he] was compassionate, kind and so very caring. As she
 19 [told] how [he prayed] for her she got choked up This [is] pure ministry [and] you
 20 understand what is truly important." *Id.* at 3108-09. "Mrs. [Donor called] to say:
 21 '[female DCSR] was amazing [and such] a blessing today for me because I asked for
 22 prayer and [she] encourage[d] me and lifted me to the Lord and I feel amazing. She is
 23 a beautiful human being and she praises GOD! She is in the *right position*.'" *Id.* at 3110

(emphasis added). “Mrs. [Donor] called to [commend DCSR for praying for her] daughter [which] touched [her] heart. She said she believes [in] World Vision [and that DCSR] is in the *right place* in the *kingdom of God*.” *Id.* at 3112 (emphasis added).

The above excerpts (Dkt. 29-16) show the duties and responsibilities of the role Plaintiff sought. They show what she would have been responsible for, and World Vision has explained how that meets the ME. *See* Defs. MSJ at 23-28.

3. Plaintiff Cannot Overcome the Statutory BFOQ Defense.

Under the facts sustaining the ME above, World Vision’s religious requirements for a DCSR, including WV’s required agreement to comply with its Biblical conduct standards, qualify as a bona fide occupational qualification (“BFOQ”). WV’s religious requirements for a DCSR satisfy the keys to Title VII’s test (“affect[ing] an employee’s ability to [do] the job”) and WLAD’s (“will contribute to the accomplishment of the purposes of the job”). *See* Pls. MSJ at 23; *see also* *EEOC v. Kamehameha Sch.*, 990 F.2d 458, 465-66 (9th Cir. 1993). The extensive evidence for this BFOQ is undisputed or indisputable. *See supra* at 20-26; Defs. MSJ at 23-28 and SO ¶¶17-57, MF ¶¶19-60.

4. Plaintiff Cannot Overcome WV’s Other Constitutional Defenses.

Plaintiff devotes over ten pages to the ministerial exception, Pls. MSJ (Dkt. 24) at 12-22, which she concludes “is the only constitutional defense potentially available.” *Id.* at 23. Due to this mistaken conclusion, Plaintiff devotes only two paragraphs to all other “potentially available” constitutional defenses. *Id.* at 24-25. She characterizes all such defenses as a “hodgepodge ... grounded in the First Amendment and other constitutional provisions,” *id.* at 24, and laments a lack of “specificity as to what facts

(if any) form the bases for these defenses.” *Id.* As shown above, this lament ignores WV’s 60-page discovery response that was served a year ago, with its 32 pages of “specificity” as to the “facts” that “form the bases for these defenses.” *See supra* at 15-16. *Without argument*, she asserts that every other affirmative defense, including “[a]ny other constitutional defense[,] fails as a matter of law.” *Id.* at 25. In effect, Plaintiff implicitly concedes that there are no disputed material facts as to such defenses and she offers no substantive legal argument against them.

World Vision reserves all 43 affirmative defenses, but focuses on just five First Amendment defenses for MSJ purposes. *See* Defs. MSJ (Dkt. 26) at 11-34. (1) Both Religion Clauses preclude jurisdiction over this lawsuit that is steeped in theological dispute. *See id.* at 11-12. But if the lawsuit is viable, Plaintiff’s claims still fail as “the First Amendment can bar the *application* of employment discrimination laws.” *Bostock*, 140 S.Ct. at 1754 (emphasis added). This is such a case for several reasons. (2) Both claims are barred by both Religion Clauses under the religious autonomy doctrine. Defs. MSJ at 21-23. (3) Both claims are barred by both Religion Clauses under the ministerial exception. *Id.* at 23-28. (4) Both claims fail strict scrutiny under the Free Exercise Clause. *Id.* at 28-32. (5) Both claims fail strict scrutiny under the expressive association doctrine of the Free Speech and Assembly Clauses. *Id.* at 32-34.

World Vision has already addressed (1) and (3) in the pages above. *See supra* at 2-5 (jurisdiction) and 20-26 (ME). The other three First Amendment defenses—(2) religious autonomy, (4) free exercise, and (5) expressive association—are addressed below in order and as renumbered in outline format. Again, Plaintiff does not counter

1 these other three First Amendment defenses with *any* legal argument.

2 **a) Both of Plaintiff's Claims Are Barred by Religious Autonomy.**

3 Plaintiff made only a fleeting reference to ME's parent doctrine of church or
4 religious *autonomy* ("autonomy"). See Pls. MSJ at 24. Though she cited *OLG* many times
5 in her MSJ, *id.* at 12-21, she never acknowledged its unequivocal statement of the law:
6

7 [T]he Religion Clauses protect religious institutions [in] matters "of faith
8 and doctrine" [against] government intrusion. State interference in that
9 sphere would *obviously violate the free exercise of religion, and any attempt*
10 *by government to dictate or even to influence such matters would constitute*
11 *[an] establishment of religion.* The First Amendment *outlaws* such intrusion.
12 The independence of religious institutions in matters of "faith and
13 doctrine" [protects] their autonomy with respect to internal management
14 decisions [and] a *component of this autonomy* is the selection of the
15 individuals who play certain *key roles*. Th[is] "*ministerial exception*"
16 [requires courts] to stay out of employment disputes involving those
17 holding certain important positions[.]²³

18 The parent doctrine of autonomy turns on the religious nature of the *employer*
19 and its *decision*. The subsidiary doctrine of ministerial exception turns on the religious
20 nature of the *job*. When either doctrine applies, it "outlaws such intrusion," *id.*,
21 "bar[ring] the *application* of employment discrimination laws." *Bostock*, 140 S.Ct. at
22 1754. "The ministerial exception derives from, and is but one manifestation of, a
23 broader (and well-settled) principle [of] *church autonomy*." *Butler*, 609 F.Supp.3d at 191
24 (citing *OLG*, 140 S.Ct. at 2061). World Vision "invokes the principle of church
25 autonomy in addition to the ministerial exception." *Id.* Autonomy would "mandate
26 summary judgment ... even if [Plaintiff] had not been hired into a ministerial role. This
27

²³ *OLG*, 140 S.Ct. at 2060 (citations omitted; emphasis added).

1 is because [WV] has pointed to documentary evidence that [Plaintiff's job offer] was
 2 terminated for religious reasons, and the principle of church autonomy precludes a
 3 jury from questioning the veracity of those reasons (or the weight to be accorded them)
 4 under the guise of pretext analysis in this case." *Id.* When either doctrine applies, there
 5 is no judicial scrutiny, no balancing of interests. Claims are "flatly barred." *Id.* at 198.

7 Ninth Circuit precedent agrees. The "autonomy principle has procedural, as
 8 well as substantive, components[, preventing] courts from subjecting religious
 9 institutions to 'protracted legal process pitting church and state as adversaries,'" *id.* at
 10 199–200 (quoting *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 949 (9th Cir.
 11 1999)), and "offers some protection from 'the expense and indignity of the civil legal
 12 process,'" *id.* at 200 (quoting *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 957 (9th
 13 Cir. 2004)). Like *Spencer*, 633 F.3d at 731, both *Bollard* and *Elvig* rely on *Cath. Bishop*,
 14 which reproved the "the very process of inquiry" in such situations. *Cath. Bishop*, 440
 15 U.S. at 502. *Accord EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996).²⁴

18 A good illustration is *Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002).²⁵
 19 There, following her same-sex civil union, a youth minister sued her church employer
 20 under Title VII "for remarks about homosexuals and [her] homosexual activities." *Id.*
 21 at 651–53. The court declined to decide if plaintiff's role met the "ministerial exception"
 22 because her claims were precluded by the "broader church autonomy doctrine." *Id.* at
 23

26 ²⁴ *Cath. Bishop* remains "good law." *Jusino v. Fed'n of Cath. Tchrs.*, 54 F.4th 95, 102 (2d Cir. 2022).

27 ²⁵ *Bryce* was cited with approval in *Hosanna*, 565 U.S. at 188 n.2.

658 n.2. Under that doctrine, personnel decisions are insulated where “the alleged misconduct is ‘rooted in religious belief.’” *Id.* at 657 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). As plaintiff suffered for “violating Episcopal doctrine,” *id.* at 652 – specifically, entering a same-sex union – and the challenged employment action consisted of “meetings to discuss that decision and the ecclesiastical doctrine underlying it, the courts will not intervene.” *Id.* at 660; accord *Butler*, 609 F.Supp.3d at 199; *Garrick v. Moody Bible Inst.*, 412 F.Supp.3d 859, 871-73 (N.D.Ill. 2019) (citing *Bryce*); *Payne-Elliott v. Roman Cath. Archdiocese*, 193 N.E.3d 1009, 1013-14 (Ind. 2022) (same).

By defying WV’s Biblical Standards of Conduct, Plaintiff breached its “standard of morals,” *Watson v. Jones*, 80 U.S. 679, 733 (1871), via “misconduct [that] is ‘rooted in religious belief.’” *Bryce*, 289 F.3d at 657. That is sufficient. But in addition, as in *Bryce*, WV’s staffing decision was the result of managerial “meetings to discuss that decision and the [religious] doctrine underlying it.” See MF ¶¶50-51 (explaining religious dimension of the decision-making process). “Under controlling case law, the church autonomy doctrine applies in the employment-discrimination context, as it does elsewhere. And this principle forecloses judicial inquiry into the plausibility of [WV’s] asserted religious justifications in this case.” *Butler*, 609 F.Supp.3d at 204.

b) Both of Plaintiff’s Claims Fail Free-Exercise Scrutiny.

Plaintiff does not address this defense.²⁶ World Vision relies on its previous arguments, *see* Defs. MSJ (Dkt. 26) at 29-32, but adds a few observations about the

²⁶ Plaintiff’s only mention of strict scrutiny are two stray references in her discussion of the WLAD. *See* Pls. MSJ (Dkt. 24) at 25-26.

quality of the government interests in the context of this case. Antidiscrimination laws serve an “important interest” but do not qualify as a public policy of the highest order. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*, 46 F.4th 1075, 1099 (9th Cir. 2022).²⁷ Here, the public policy of “highest order,” *Yoder*, 406 U.S. at 215, the one *Bostock* was “deeply concerned with,” *Bostock*, 140 S.Ct. at 1754, is “preserving the promise of the free exercise of religion enshrined in our Constitution [and whose] guarantee lies at the heart of our pluralistic society,” *id.* This guarantee protects “deep and sincere religious beliefs” opposed “to gay marriage.” *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm’n*, 138 S.Ct. 1719, 1728 (2018). Such beliefs are “due proper respect,” Respect for Marriage Act, Pub. L. 117-228, §2(2) (Dec. 13, 2022), not vilification or subordination.

c) Both Claims Fail Expressive-Association Scrutiny.

Plaintiff does not address this defense. World Vision relies on its previous arguments. *See* Defs. MSJ (Dkt. 26) at 32-34. *See also* Free Exercise discussion, above.

5. Plaintiff Cannot Overcome the WLAD ROE.

Plaintiff agrees that the scope of WLAD’s ROE is governed by *Woods v. SUGM*, 197 Wash. 2d 231 (2021).²⁸ In her words, the test for the WLAD ROE is “whether or not the employee’s position fits within the ministerial exception consistent with the tests

²⁷ *Reh’g en banc granted, opinion vacated*, 59 F.4th 997, *injunction pending appeal granted*, 64 F.4th 1024 (2023) (en banc). Normally, “[v]acated opinions remain persuasive ... authority,” *Spears v. Stewart*, 283 F.3d 992, 1017 n.16 (9th Cir. 2001), unless and until their logic is overruled. Here, the logic was actually reinforced by the en-banc court, which (over just one dissent) issued an injunction pending appeal, meaning it found a likelihood of success. *FCA*, 64 F.4th 1024.

²⁸ *Woods* did not decide the federal constitutional issues, which should have led to a different result. WV reserves the right to revisit this issue in light of any applicable legal developments.

laid out in *Hosanna-Tabor* and *Our Lady of Guadalupe*.” Pls. MSJ at 25. As WV has argued at length, the DCSR position that Plaintiff sought meets these tests. *See supra* at 20-26 and Defs. MSJ at 23-28. The DCSR position therefore meets the WLAD ROE. Regardless, Plaintiff’s state claim must bow to each and every WV defense based in the U.S. Constitution. *See* MSJ at 34-36; *see also supra* 20-31.

6. Defendant’s RFRA Defense Is Not At Issue on Summary Judgment.

WV has not asserted any RFRA defense for MSJ purposes, *see* Defs. MSJ at 25 n.25, but reserves it for subsequent proceedings and precedential developments.

IV. CONCLUSION.

Plaintiff’s MSJ should be denied and her case dismissed with prejudice. As part of the Court’s decision, World Vision respectfully suggests that the Court include alternate rulings to help withstand appeal, since an ongoing “process of inquiry” will continue to infringe WV’s First Amendment rights. *Cath. Bishop*, 440 U.S. at 502. The Ninth Circuit has been clear: courts should follow the “well-trodden path” of “reaching and deciding a dispositive First Amendment issue that will avoid forcing the parties through unnecessary and protracted litigation.” *Green*, 52 F.4th at 800 (citations omitted). They should offer protection from “the expense and indignity of the civil legal process,” *Elvig*, 375 F.3d at 957, not subject religious institutions to “protracted legal process pitting church and state as adversaries,” *Bollard*, 196 F.3d at 949. In fact, *Spencer* itself requires this. 633 F.3d at 731.

Summary judgment for Plaintiff would require ruling against every applicable and validly asserted affirmative defense. Summary judgment for World Vision would

1 require ruling in favor of just one of its defenses based in the U.S. Constitution, which
2 necessarily trumps both (all) statutory claims. Alternate rulings would help limit this
3 litigation, preserving the parties' and public's resources and legal rights, if they would
4 support appellate affirmance on an alternate ground.
5

6 This case should be dismissed with prejudice.

7 Respectfully submitted,

8 DATED this May 1, 2023
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1 I certify that this memorandum contains 10,012 words, in compliance with the
2 10,500-word limit in the Court's Order on Over-Length Briefs filed 4/5/2023 (Dkt. 21).
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